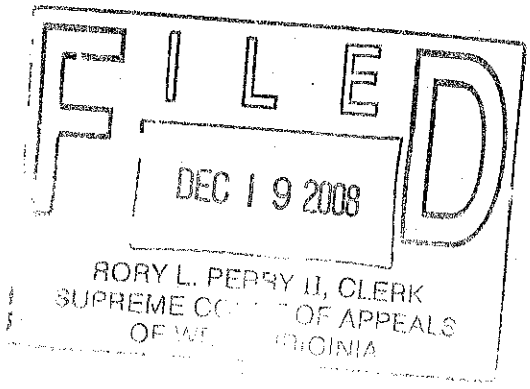
No. 34139

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



JOSEPHINE MORGAN

Plaintiff,

v.

FORD MOTOR COMPANY,
a Delaware corporation;
BRIDGESTONE/FIRESTONE, INC.,
an Ohio corporation; and
FRANCIS ROBERT MORGAN,

Defendants

and

MICHELLE ARCHULETA, as Personal Representative of THE ESTATE OF FRANCIS ROBERT MORGAN,

Petitioner, Cross-Claim Plaintiff Below,

v.

FORD MOTOR COMPANY,
a Delaware corporation,

Respondent, Cross-Claim Defendant Below.

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS AMICUS CURIAE IN SUPPORT OF DEFENDANT-RESPONDENT AND AFFIRMANCE

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

A state jury cannot rewrite federal motor vehicle safety standards. Petitioner seeks to impose state common-law tort liability upon Ford because it used tempered glass in the side windows of the 1999 Ford Expedition even though federal law specifically authorized auto manufacturers to use tempered glass. Federal Motor Vehicle Safety Standard 205 ("FVMSS 205"), at the time the 1999 Ford Expedition was manufactured, *required* automobile manufacturers to use one of three glazes for side windows: tempered, laminated, or glass-plastic glazing. Auto manufacturers could not choose other glazes or window types available for their vehicle's side windows. Plain glass, for example, was prohibited by federal regulation, and manufacturers had to use one of the glazes specified in the regulation. Compliance was not "optional."

Petitioner could not dispute that a state lawsuit or regulation would be preempted if it sought to declare all three of FVMSS 205's options unsafe. Such a situation would be text book conflict preemption: a state law that prohibits what is required by federal regulation cannot stand. *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 37 (1996) (concluding that "ordinary legal principles of pre-emption" prevent a state law from prohibiting activity that federal law explicitly authorized).

The answer is no different when Petitioner seeks to declare one of the options within FMVSS 205 unsafe. That automobile manufacturers would still have two "safe" choices — laminated glass or glass-plastic glazing — after this lawsuit does not matter. The next lawsuit could just as easily target laminated glass or glass-plastic glazing. The law does not countenance that the first two plaintiffs can have their day in court but that the third is preempted. If FMVSS 205 does not have preemptive effect, there is no backstop to prevent states, or different

jurisdictions in the same state, from striking *each* option as unsafe. States can no more create a conflict with federal regulations in piecemeal fashion than they can in one fell swoop.

This case here is more rudimentary than the two cases that both parties spend much time dissecting, *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), and *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002). In *Geier*, the Supreme Court held that a general federal safety policy permitting passive restraint options, which was arguably a minimum safety standard, preempted a state common-law tort claim — even though the state law did not directly conflict with the federal regulation. In *Sprietsma*, the federal government simply refused to regulate at all, so there was no conflict. Here, not only did the government act, but it mandated compliance with one of three separate glazes; actually, there would be direct conflict if the state were to declare one of these glazes unsafe.

Not only does Petitioner's claim directly conflict with FMVSS 205, but allowing Petitioner's claim to continue would undermine several polices underlying both the National Traffic and Motor Safety Act ("Safety Act"), which authorized the federal government to promulgate automotive safety standards, and FMVSS 205. First, the National Highway Traffic Safety Administration ("NHTSA") ultimately determined, after decades of research and study, that the balancing of safety, cost, and technological concerns favors the continued use of tempered glass in vehicles' side windows. Second, the application of a common-law standard that deviates from FMVSS 205 would destroy the national uniformity of federal standards desired by the Safety Act. Third, Petitioner's position would allow a lay jury to usurp the policy decisions made by federal experts of the appropriate types of safety glass to use in side windows. Finally, the common-law standard advocated by Petitioner threatens to impose massive, repeated,

retroactive tort liability upon manufacturers for using a type of side window glass specifically authorized by the federal government.

Moreover, the reasoning of *O'Hara v. General Motors Co.*, 508 F.3d 753 (5th Cir. 2007), on which Petitioner principally relies to support her position, is flawed. The Fifth Circuit primarily supported its analysis by relying upon *Sprietsma*, which is completely inapplicable to the issue presented in *O'Hara* and in this appeal. *O'Hara* also erred in concluding that FMVSS 205 is a material standard and consequently a minimum safety standard. FMVSS 205 is not a minimum safety standard. It requires auto manufacturers to use one of the designated glazes for side windows; it does merely not set a floor of minimal requirements for glazing materials (such as a certain strength or thickness of tempered glass if one chooses to use it), but authorizes alternatives for safety reasons. Finally, *O'Hara* failed to consider the significant safety policy concerns underlying the Safety Act and FMVSS 205.

Thus, Petitioner's claim is preempted on two grounds: her claim directly conflicts with FMVSS 205, and her claim would significantly frustrate the policies underlying the Safety Act and FMVSS 205.

II. FACTUAL AND REGULATORY BACKGROUND

Petitioner's claim underlying this appeal involves a rollover accident in a 1999 Ford Expedition driven by Francis Morgan. (Petr's Br. 3) During the rollover, Mr. Morgan sustained injuries to his left arm and hand when they went through the tempered glass in the vehicle's side window. (*Id.* at 5 (citing testimony of Paul Lewis)) Petitioner contends that the 1999 Ford Expedition is uncrashworthy because Ford used tempered safety glass in the vehicle's side windows instead of laminated glass. (*Id.*) Petitioner's claim relates solely to Ford's choice of tempered safety glass for the side windows — a choice authorized by FMVSS 205 — over other materials that are also authorized under this safety standard. (*Id.*)

After evaluating Petitioner's contention, the circuit court granted Ford's motion for summary judgment, concluding that, "because tempered glass is a permitted option for manufacturers to use in vehicle side windows under FMVSS 205, the imposition of state tort liability based on the exercise of such option would frustrate the full purposes and objectives of Congress." (Circuit Court Final Order at 7, ¶ 11) Thus, the court concluded that the federal safety standard preempted the Petitioner's claim. (*Id.*)

FMVSS 205 was among the original safety standards issued pursuant to the Safety Act. Congress enacted the Safety Act in 1966 to protect the public "against unreasonable risk of accidents occurring as a result of the design, construction or performance of motor vehicles, and... against unreasonable risk of death or injury in [an accident.]" 15 U.S.C. § 1391(1). Congress intended the safety standards promulgated under the Safety Act to be "uniform national standards." *Wood v. General Motors Corp.*, 865 F.2d 395, 412 (1st Cir. 1988). The Senate Report on the Act emphasized that "[t]he centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States requires that motor vehicle safety standards be not only strong and adequately enforced, but that they be uniform throughout the country." S. Rep. No. 89-1301, at 12 (1966). Otherwise, as President Johnson noted: "The only alternative is unthinkable – 50 standards for 50 different States. I believe that this would be chaotic." 112 Cong. Rec. 14,253 (1966).

FMVSS 205 "specifies performance requirements for the types of glazing that may be installed in motor vehicles" and "specifies the vehicle locations in which the various types of glazing may be installed." NHTSA, Glazing Materials, Final Rule, 68 Fed. Reg. 43,964, 43,965 (July 25, 2003). The purpose of FMVSS 205 is vehicle safety: "to reduce injuries resulting from impact to glazing surfaces, to ensure a necessary degree of transparency in motor vehicle

windows for driver visibility, and to minimize the possibility of occupants being thrown through the vehicle windows in collisions." 49 C.F.R. § 571.205, S2. Under FMVSS 205, tempered glass and laminated glass are approved glazing materials. *See* ANSI/SAE Z26.1-1996 §§ 3.2 (tempered glass), 3.3 (laminated glass), *incorporated by reference in* 49 C.F.R. § 571.205, S3.2(a). Laminated glass is approved for use throughout a vehicle, while tempered glass can be used anywhere other than in the front windshield.[1] *See* ANSI/SAE Z26.1-1996, T. 1 (Items 1 & 2).

Since the first version of FMVSS 205, NHTSA has initiated rulemaking several times to amend the standard either directly or through incorporation of revised versions of Z26.1.[2] Although approved glazing materials for various applications have been added and deleted through NHTSA's various amendments, NHTSA has always opted to retain tempered safety glass as an approved material for use in side and rear windows. *Compare* Z26.1-1966 *with* Z26.1-1996.

NHTSA's decision reflects the fact that no one type of glazing material provides the maximum degree of safety in all situations. *See* ANSI/SAE Z26.1-1996 § 2.2 ("One safety glazing material may be superior for protection against one type of hazard, whereas another may be superior against another type . . . . [N]o one type of safety glazing material can be shown to possess the maximum degree of safety under all conditions."). NHTSA's testing showed that,

[1] In fact, Ford was the first automobile company to use laminated glass in its front windshields due to the particular safety concerns arising from the use of other glazing materials in front windshields.

[2] *See, e.g.*, 48 Fed. Reg. 52601 (November 16, 1983) (permitting use of glass-plastic materials); 49 Fed. Reg. 6732 (February 23, 1984) (incorporating a new version of Z26.1); 56 Fed. Reg. 18526 (April 13, 1991) (permitting use of annealed glass-plastic glazing and tempered glass in certain applications); 57 Fed. Reg. 40161 (July 8, 1992) (permitting certain uses of tempered glass-plastic glazing); 68 Fed. Reg. 43962 (July 25, 2003) (incorporating a new version of Z26.1).

though some types of laminated or advanced glazing appear to offer enhanced resistance to occupant ejection, these materials also create an increased risk of neck injury for occupants. 67 Fed. Reg. 41365-41367 (June 18, 2002). Additionally, NHTSA concluded that the effective utilization of laminated and advanced glazing would require changes in vehicle design that would result in smaller windows, both reducing driver vision and adding significant costs. *See id.* at 41367. Finally, NHTSA observed that the advent of ejection mitigation systems, such as side curtain airbags that do not rely upon glazing, should be encouraged as a better solution for safety. *Id.*

Accordingly, after a decade of in-depth testing and study, NHTSA concluded that the safety and cost concerns implicated by FMVSS 205 are best served by continuing to approve the use of tempered safety glass for side windows. *See* 67 Fed. Reg. at 41365-41367; *see also Ejection Mitigation Using Advanced Glazing, A Status Report, November 1995*, Docket Nos. 95-041-GR-002, 97-1782-003; *Ejection Mitigation Using Advanced Glazing: Status Report II*, Docket No. 96-1782-21 (August 1999); *Ejection Mitigation Using Advanced Glazing*, Docket No. 96-1782-22 (August 2001). In 2002, NHTSA withdrew its notice of proposed rulemaking regarding whether tempered glass should be removed as an option for manufacturers in favor of only laminated or advanced glazing (hereinafter "Notice of Withdrawal").[3] *See* 67 Fed. Reg. 41367. Consequently, FMVSS 205 continues to authorize tempered safety glass for use in side windows. *See id.* ("The agency is extremely reluctant to pursue a requirement that may increase injury risk for belted occupants to provide enhanced safety benefits primarily for unbelted occupants, by preventing their ejection from the vehicle.").

[3] Laminated glass and glass-plastic glazing are types of advanced glazing authorized under FMVSS 205.

III. ARGUMENT

Article VI of the United States Constitution provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Consistent with that command, courts have long recognized that state laws that conflict with federal law are "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

All parties involved in this appeal agree that this case presents a question of implied conflict preemption under the Supremacy Clause. Implied conflict preemption looks for an actual conflict between federal law and state law. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988); *In re W. Va. Asbestos Litigation*, 215 W. Va. 39, 43 (2003). An actual conflict exists when either compliance with both federal and state law is impossible or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Fidelity Fed. Savings & Loan Assoc. v. de la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Petitioner's claim is impliedly preempted because her claim directly conflicts with FMVSS 205. Additionally, Petitioner's claim is preempted because it would significantly frustrate the policies underlying the Safety Act and FMVSS 205.

A. Petitioner's State Law Tort Claim Directly Conflicts With The Requirements of FMVSS 205.

Through FMVSS 205, NHTSA has authorized a few limited options among which manufacturers can choose when selecting glass for an automobile's side windows. *See* 49 C.F.R. § 571.205. Among these few authorized options is tempered glass. *See id.* As Petitioner admits, manufacturers are forced to comply with the regulation by using a type of glass specifically enumerated in the regulation. (Petr's Br. 2) A manufacturer cannot choose to use another type

of glass not articulated in the regulation for use in side windows without violating federal law. *See* 49 C.F.R. § 571.205. As a result, the *plain language* of FMVSS 205 expressly authorizes manufacturers to use tempered glass for the side windows of automobiles. *Id.* (providing that manufacturers must choose among one of six authorized glazes for use in side windows). In this suit, Petitioner seeks to impose liability, through state common-law tort liability, upon Ford solely because of Ford's choice to use tempered glass for the side windows of the 1999 Expedition — a choice authorized by FMVSS 205. (Petr's Br. 5.)

Allowing a state to impose liability upon a manufacturer for the use of tempered glass would directly conflict with the explicit language of FMVSS 205 and thus is preempted. *See Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 31 (1996) (noting that a direct conflict exists where federal law authorizes activity that state law "expressly forbids"); *de la Cuesta*, 458 U.S. at 156 (holding that state law may not forbid the use of a contract term expressly authorized by a federal regulation); *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981) ("'It would be inconsistent with [federal] policy . . . if local authorities retained the power to decide' whether the carriers could do what [federal law] authorized them to do.") (quoting *Chicago v. Atchison, T. & S.F.R. Co.*, 357 U.S. 77, 87 (1958)).

Furthermore, the fact that NHTSA has specifically authorized a manufacturer to choose among a limited array of options to comply with a regulation does not mean that a state may preclude the manufacturer from choosing one of those options. *See Hurley v. Motor Coach Indus., Inc.*, 222 F.3d 377, 383 (7th Cir. 2000); *see also Irving v. Mazda Motor Corp.*, 136 F.3d 764, 769 (11th Cir. 1998) ("Because Plaintiff sued Defendants for exercising an option explicitly permitted by Congress, a conflict exists between state and federal law if Plaintiff goes forward with this state law claim of defective design."). For example, in *Hurley*, the plaintiff brought a

state common-law tort claim alleging that the manufacturer's bus was defective because the bus did not have a complete passenger protection system, which could include a steel cage, crumple zone, airbag, and three-point seatbelt. 222 F.3d at 381. Under the relevant federal safety standard, the manufacturer was required to equip the bus with either a complete passenger protection system or a two-point seatbelt. *Id.* Using traditional preemption principles, the Seventh Circuit concluded that, "when a Federal Motor Vehicle Safety Standard leaves a manufacturer with a choice of safety device options, a state suit that depends on foreclosing one or more of those options is preempted."[4] *Id.* at 383. The same analysis applies to Petitioner's claim in this appeal. Petitioner cannot impose tort liability on Ford for use of tempered glass over laminated glass and thus foreclose to manufacturers an option authorized by the federal safety standards.

If states were permitted to eliminate one option that federal law expressly sanctions, nothing would prevent states from eliminating any or all of the options contained in FMVSS 205. Congress intended to authorize manufacturers to decide which type of glass to use — it did not intend to permit states to pick and choose which federally authorized options are amenable to each individual state or any particular jury within a state. Such a result would not only destroy any semblance of uniformity, but would also potentially subject automobile manufacturers to different design standards in each state or potentially multiple standards within the same state.[5]

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[4] In addition to analyzing the plaintiff's claim under traditional preemption principles, the Seventh Circuit also examined the claim in light of *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000). *Hurley*, 222 F.3d at 382. The court concluded that under either analysis the result is the same — the plaintiff's claim is preempted by the federal safety standard. *Id.*

[5] This practical result is one reason that Petitioner is wrong to argue that tort liability would supplement FMVSS 205. The Supreme Court has recognized the intersection of preemption and the federal government's commerce power, stating that it is "not always a sufficient answer to a claim of pre-emption to say that state rules supplement, or even mirror,

For example, under the regime Petitioner advocates, a jury in Virginia or Kentucky might decide that laminated glass in side windows is necessary to meet a common-law duty of care; while a jury in Ohio or North Carolina might decide that laminated glass is dangerous and a breach of common-law standards. Furthermore, a jury in Kanawha County may determine that glass-plastic glazing is required in side windows, while a jury in Harrison County may determine that a glass-plastic glazing is dangerous and a breach of the manufacturer's duty of care. Because imposing tort liability based on the exercise of a federally-authorized choice presents an actual conflict, Petitioner's claim is preempted.

This appeal presents a stronger case of implied conflict preemption than *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000). Unlike this current appeal, *Geier* did not involve a direct conflict. At issue in *Geier* was FVMSS 208, a regulation dealing with passive restraint systems. *Id.* at 879. The regulation required manufacturers to install some type of passive restraint, such as airbags or automatic seatbelts, in at least 10% of its cars by model year 1987. 49 C.F.R 571.208.S4.1.3.1. The rule did not require auto manufacturers to install any particular type of restraint and did not limit manufacturers' choices. *See id.* Manufacturers could install automatic seatbelts, airbags, or any other suitable passive restraint technology so long as it met the minimum performance standards. *See id. Geier*, accordingly, on its face was arguably a minimum safety standard.

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federal requirements." *United States v. Locke*, 529 U.S. 89, 115 (2000). The goal of uniformity, while not dispositive, must be considered when deciding whether concurrent regulation is appropriate. *Id.* As Justice Holmes stated: "When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." *Charleston & Western Carolina Railway Co. v. Varnville Furniture Co.*, 237 U.S. 597, 604 (1915).

The Supreme Court in *Geier*, nevertheless, held that FVMSS 208 preempted state tort lawsuits that would frustrate the objectives of the federal regulation. The Court noted that the Secretary of Transportation had specifically rejected an all-airbag standard in favor of a more gradual phase-in of passive restraints. *Id.* at 879. The objective of FVMSS 208 was to provide manufacturers "a range of choices among different passive restraint devices" so as to "bring about a mix of different devices introduced gradually over time." *Id.* at 875. In that way, the federal government best believed that it could maximize safety. The Court thus held that FVMSS 208 preempted a state tort lawsuit claiming that Honda should have installed an airbag in plaintiff's car. The Court held that, "by its terms [such a lawsuit] would have required manufacturers of all similar cars to install airbags rather than other passive restraint systems . . . [and] thereby would have presented an obstacle to the variety and mix of devices that the federal regulation sought." *Id.* at 881.

Petitioner fundamentally misconstrues *Geier*. Petitioner contends that, in *Geier*, "it would have been sufficient to point out that the car maker in that case (Honda) had chosen to install one of several permitted regulatory options." (Petr's Br. 11-12) That is wrong. The plaintiff in *Geier* did not challenge the effectiveness of *another* approved passive restraint system. In fact, as the Court expressly states, *the car in* Geier *was not equipped with any passive restraint system*. *Id.* at 865. Thus, the *Geier* plaintiff's lawsuit did not seek to have one option declared unsafe in favor of another. There was no direct conflict with the language of the regulation, and the Supreme Court could not have relied solely on the fact that Honda had installed a permitted option. The conflict in *Geier* instead came from the frustration of the purpose of FMVSS 205.

To be sure, had the plaintiff sought to declare automatic seatbelts unsafe, even the *Geier* dissenters likely would have concluded that the lawsuit was preempted. The dissent explains that, in its view, preemption would be required "of course, if petitioners had brought common-law tort claims challenging Honda's compliance with a mandatory minimum standard -- *e.g.*, claims that a 1999 Honda was negligently and defectively designed *because* it was equipped with airbags as required by the current version of Standard 208." *Id.* at 893 n.6 (Stevens, J., dissenting).

Honda's preemption argument prevailed in *Geier,* even though there was no direct conflict, and the regulation appeared to mandate only minimum standards. The argument against Petitioner's case here is much easier. Here, because there is a direct conflict between the regulation's requirements and state tort law, the state tort suit is preempted. No further analysis is needed.

B. Petitioner's State Law Tort Claim Frustrates The Purpose of FMVSS 205.

Petitioner's lawsuit also fails under a *Geier* analysis. When a state tort lawsuit would interfere with a federal objective — in *Geier*, the desired mix of different passive restraint packages — the lawsuit is preempted. Not only does a direct conflict exist here, but Petitioner's lawsuit, if permitted, would also frustrate the federal safety standard.

1. Under a *Geier* analysis, the policy decisions behind FMVSS 205 impliedly preempt Petitioner's claim.

The Supreme Court in *Geier* determined that a conflict existed between FMVSS 208's policy and the plaintiff's state common-law tort claims, based on a detailed analysis of NHTSA's cost, safety, and technological policy decisions supporting the adoption of FMVSS 208. 529 U.S. at 875-79. The Supreme Court examined the safety concerns, noting that NHTSA had rejected an all-airbag standard due to "safety concerns (perceived or real) associated with airbags." *Id.* at

879 (citing 49 Fed. Reg. 28990, 29001 (1984)). The Court also considered the fact that NHTSA had authorized manufacturers to choose among different technologies that would allow for the development of comparative performance data and would facilitate development of alternative, cheaper, and safer technologies. *Id.* (citing 49 Fed. Reg. 28990, 29001-02 (1984)). Finally, the Court evaluated the fact that the asserted common-law duty to provide airbags would present an obstacle to the mix of technologies and manufacturer choice intended by the federal safety standard. *Id.* at 881. Ultimately, because the state tort law claim would interfere with, and obstruct the accomplishment and execution of, the important means-related federal objectives embodied in FMVSS 208, the plaintiff's claim was held to be preempted. *See id.*

Geier establishes that a federal regulation based on an agency's balancing of safety, costs, and technological concerns is a legitimate federal objective deserving preemption protection. This principle is hardly novel, and the states have regularly accepted it. *See, eg., Frith v. BIC Corp.*, 863 So. 2d 960, 967 ¶17 (Miss. 2004) (en banc) (concluding that plaintiff's claim failed as a matter of law because its effect was to punish the manufacturer for selling a certain product — a lighter that a ten-year-old could operate — when the federal government had determined such product was safe enough and should continue on the market).

Similar to FMVSS 208, FMVSS 205 was developed, and has remained in effect, because of the balancing of safety, costs, and technological concerns performed by NHTSA. First, in its continual re-evaluation of FMVSS 205, NHTSA has examined decades of research on the issue of appropriate glazing materials for vehicles and has amended the standard when it determined that new glazing materials are sufficiently safe for use. Through all versions of FMVSS 205, NHTSA has deliberately opted to retain tempered safety glass as an approved material for use in side windows. *Compare* Z26.1-1966 *with* Z26.1-1996.

NHTSA's decision relies on research showing that no one type of glazing material provides the maximum degree of safety in all accident circumstances. *See* ANSI/SAE Z26.1-1996 §§ 2.2 ("One safety glazing material may be superior for protection against one type of hazard, whereas another may be superior against another type . . . . [N]o one type of safety glazing material can be shown to possess the maximum degree of safety under all conditions."). For example, though laminated glazing appears to offer enhanced resistance to occupant ejection, it also presents an increased risk of neck injury for occupants — a risk not associated with the use of tempered glass. *Id.* at 41366-67. Although testing revealed that the use of laminated glazing can increase two forces imposed on the neck in crashes, the limits of its technology prevented NHTSA from determining the likely severity or frequency of neck injuries from the use of laminated glass in side windows. Without a doubt, however, neck injuries can cripple, disable and, worse, paralyze persons for life. The risk of neck injuries cannot be lightly brushed aside. Furthermore, NHTSA also concluded that laminated glazing would result in smaller windows, which would reduce driver visibility. *See* 67 Fed. Reg. 41367. Less visibility could mean more accidents and more deaths and serious injuries. The federal decision to authorize tempered glass in side windows recognizes the trade-off of risk and the need for more real-world and test data before conclusively removing an option.

As a result, NHTSA's decision to continue the use of tempered glass in side windows reflected its expert judgment regarding both the uncertainty surrounding the benefits of laminated and advanced glazing in side windows and the uncertainty surrounding the potential severe dangers from laminated and advanced glazing.[6] Petitioner, naturally, only looks at the

[6] As this Court has recognized in the state-law context, the Court should defer to the expertise of the regulatory agency. *See, e.g., Princeton Cmty. Hosp. v. State Health Planning,*

accident injuring Mr. Morgan. Consequently, Petitioner seeks to establish a common-law standard that narrowly focuses on individuals who want to claim that they would not have been injured had their vehicle had laminated or advanced glazing.

NHTSA, however, is charged with promulgating nationwide standards that "protect against unreasonable risk of death or injury" in all accident patterns. With that broader perspective mandated by the Safety Act, NHTSA retained a safety standard that carefully balanced the competing public interests of individuals like the Petitioner with those individuals who may have been injured or disabled had laminated or advanced glazing been the only choice. *See* 67 Fed. Reg. at 41367 ("The agency is extremely reluctant to pursue a requirement that may increase injury risk for belted occupants to provide enhanced safety benefits primarily for unbelted occupants, by preventing their ejection from the vehicle."). A single jury, which undoubtedly will feel sympathy to the plaintiff before it and dwell on the particular circumstances of the plaintiff's accident, should not be allowed — and under the Supremacy Clause is not allowed — to undo a federal agency's expert decision made in the wider public interest.

Furthermore, if laminated or advanced glazing were clearly the preferred safety choice for side windows, as Petitioner alleges, consumers would have actively demanded manufacturers to use it in their vehicles, and manufacturers would have responded to consumer demand. Petitioner would also likely have bought a car that used laminated or advanced glazing in its side windows. Instead, as shown by the fact that nearly ninety percent of current vehicles use

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174 W. Va. 558, 564 (1985) ("[T]he court must give due deference to the agency's ability to rely on its own developed expertise.").

tempered glass, there has been no or limited public outcry regarding manufacturers' use of tempered glass over laminated or advanced glazing in side windows.

Second, the Supreme Court in *Geier* validated NHTSA's policy concern for the expense that manufacturers would face in requiring all cars to have airbags. Here, too, NHTSA was concerned with cost to manufacturers, and ultimately consumers, when it decided to maintain the glazing options laid out in FMVSS 205. NHTSA concluded that the use of laminated or advanced glazing would require design modifications to side windows, which would entail significant costs for manufacturers. *See id.* at 41367.

Third, in *Geier*, the Supreme Court validated NHTSA's policy decision to allow the mix of technologies and manufacturer choice because it encouraged manufacturers to develop new and better technologies for safety. Here, too, NHTSA was concerned with encouraging manufacturers to develop new technologies for side window safety. By not altering the requirements of FMVSS 205, NHTSA intended to encourage the development and increased use of ejection mitigation systems, such as side curtain airbags, that do not rely upon glazing. 67 Fed. Reg. at 41367. Thus, similar to FMVSS 208, FMVSS 205 was developed, and has remained in effect, due to NHTSA's balance of safety, costs, and technological concerns. FMVSS 205 therefore preempts state law that would conflict with these objectives.

2. Petitioner's Reliance On *O'Hara* And *Sprietsma* Is Mistaken.

To counter *Geier*, Petitioner relies almost exclusively on *O'Hara v. General Motors Corp.*, 508 F.3d 753 (5th Cir. 2007), to support her argument. In *O'Hara*, the Fifth Circuit held that FMVSS 205 did not preempt a state common-law claim that the use of tempered glass in the side windows of automobiles was unreasonably dangerous. *Id. at 764.*

The reasoning of *O'Hara*, however, is flatly wrong in numerous respects. First, the Fifth Circuit failed to consider the appropriate conflict analysis. That court, like Petitioner,

misconstrued the nature of the underlying challenge in *Geier* — and failed to see the material differences between FMVSS 205 and FMVSS 208. Instead of applying a conflict analysis, *O'Hara* jumped immediately to try to discern the underlying policy of FMVSS 205. The court then focused almost entirely on the background of the regulation, primarily on the Notice of Withdrawal in 2002. *O'Hara*, 508 F.3d at 759-63. It erroneously fell into a trap of its own making, concluding that NHTSA had failed to enact any regulation when it withdrew its proposed rulemaking contemplating the elimination of tempered glass as an authorized option under FMVSS 205. *Id.* at 762-63. Not so — FMVSS 205 remained intact as it had existed for years. The Fifth Circuit inexplicably overlooked the conflict.

To bolster its wrong conclusion, *O'Hara* relied upon *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002). *Sprietsma* arose from a boating accident where a person fell overboard and was killed when struck by the propeller blades of an outboard engine. *Id.* at 54. The decedent's survivor sued the boat manufacturer, contending that the engine should have had a propeller guard. *Id.* The boat manufacturer argued that the claim was preempted under the Federal Boat Safety Act ("FBSA") because the Coast Guard had earlier decided, after considerable research, not to promulgate a regulation requiring propeller guards. *Id.*

In concluding that the FBSA did not preempt petitioner's claim, the Supreme Court explained that the decision not to regulate a particular aspect of boating safety was "consistent with an intent to preserve state regulatory authority." *Id.* at 52. *Sprietsma*, however, is completely inapplicable to the issue presented by FMVSS 205. Unlike the situation in *Sprietsma*, where the federal agency specifically declined to adopt a regulation, NHTSA *has*, for almost 40 years, regulated the types of materials that are authorized for use in side windows in vehicles. Thus, even if *Sprietsma* were to stand for the proposition that an agency's failure to regulate

cannot be preemptive, that principle does not apply to FMVSS 205. There is a federal rule, and there is a conflict between FMVSS 205 and Petitioner's claim in this appeal. That NHTSA did not require *further* regulation when it issued its Notice of Withdrawal does not take away the existing FMVSS 205. *See Frank v. Delta Airlines Inc.*, 314 F.3d 195, 199 n.6 (5th Cir. 2002) (distinguishing *Sprietsma* on the ground that the *Frank* case "involve[d] the preemptive effect of *adopted* FAA regulations as opposed to the preemptive effect of the Coast Guard's decision *not* to regulate propeller guards in *Sprietsma*") (emphasis added). *O'Hara* missed the boat.

Second, *O'Hara* wrongly concluded that FMVSS 205 was a material standard and hence merely a minimum safety standard. 508 F.3d at 763. The fact that FMVSS 205 required auto manufacturers to use one of the designated glazes distinguishes it from a material or minimum safety standard. FMVSS 205 is a safety standard by its very terms: it specifically provides that manufacturers must choose among one of six authorized glazes for use in side windows. Minimum safety standards create a regulatory floor that a manufacturer must meet. In accordance with such a standard, states have room to mandate more strenuous regulations than the minimum contained within the federal standard but cannot regulate in a manner that conflicts with that federal standard. For example, *Geier* distinguished FMVSS 105, 49 C.F.R. 571.105, which establishes minimum standards for brake performance and the installation of airbrakes. A lawsuit that contends the car should have included anti-lock brakes would go beyond this minimum standard and thus would not create a conflict with the federal regulation. Thus, if FMVSS 205 were to be viewed only as a material standard for minimal safety, Petitioner could argue that thicker or stronger tempered glass should have been required — in other words, the state minimal standard for tempered glass is higher than the federal standard. But that is not the case here. Instead, Petitioner is seeking to declare Ford's authorized choice of tempered glass

itself unsafe. That is not a more strenuous regulation, but a contrary regulation and therefore is preempted.

Third, *O'Hara* failed to recognize the significant and broader policy decisions underlying not only FMVSS 205, but the entire Safety Act. For example, the application of a common-law standard that conflicts with FMVSS 205 would destroy the national uniformity of federal standards desired by the Safety Act. *See* H.R. Rep. No. 89-1776, at 17 (1966) ("[T]his preemption subsection is intended to result in uniformity of standards so that the public as well as industry will be guided by one set of criteria rather than by a multiplicity of diverse standards."). Instead of uniformity, some states could punish manufacturers for not having tempered glass in side windows, others could require only laminated glass, and yet others could require only glass-plastic glazing. *See Kalo Brick*, 450 U.S. at 326 ("A system under which each State could, through its courts, impose . . . its own . . . requirements could hardly be more at odds with the uniformity contemplated by Congress."). The "unthinkable" situation feared by President Johnson ("50 standards for 50 different states") would become a reality. *See also Traffic Safety: Hearings on H.R. 13228 Before the House Comm. on Interstate and Foreign Commerce*, 89th Cong., 2d Sess., pt. 1, at 606 (1966) (statement of Rep. Hathaway) (explaining that uniform national standards were needed because multiple and inconsistent state standards would "creat[e] chaos in the automotive industry").

Adopting Petitioner's position, and that advanced by the court in *O'Hara*, would essentially do away with NHTSA's policy decisions regarding glass materials in side windows. Petitioner's position would allow each lay jury to determine the appropriate type of glass in side windows for each plaintiff and each accident regardless of the decades of research on which federal experts made policy decisions addressing this issue within the federally-mandated

program on vehicle safety. Allowing common-law claims to set aside a determination of NHTSA's safety policies would unduly interfere with the regulatory means authorized by Congress to achieve the Safety Act's stated goals. *See* 15 U.S.C. § 1392(f)(3) (providing the federal government with the authority to determine what is "reasonable, practicable and appropriate for the particular type of motor vehicle or item of motor vehicle equipment").

Finally, the common-law standard advocated by Petitioner, and the court in *O'Hara*, threatens to impose massive, repeated, after-the-fact tort liability upon manufacturers for installing tempered glass, not laminated or advanced glazing, in vehicles' side windows. As admitted by Petitioner's glazing expert, virtually every vehicle produced by every manufacturer in the world between 1965 and 1995 — more than two billion vehicles and more than ninety percent of current vehicles — uses tempered glass in its side windows. (Feaheny Depo. at 42-43.) A common-law rule prohibiting the use of tempered glass in side windows would punish automobile manufacturers in an unforeseeable, retroactive manner and with unprecedented severity for exercising a right granted to them by federal law.[7] Not one of these significant policy and constitutional due process implications was addressed, or even contemplated, by the court in *O'Hara*.

In short, *O'Hara* was wrongly decided. *O'Hara* did not consider the direct conflict; it misapplied *Geier* and erroneously relied on *Sprietsma*, which is not applicable to the issues presented by FMVSS 205; and it failed to consider the broader policy concerns supporting both

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[7] States cannot impose common-law damages on parties for doing what federal law authorized them to do. *See Kalo Brick*, 450 U.S. at 318, 326-330 (concluding that a state cannot award damages on account of a railroad abandonment approved by the ICC). And states certainly cannot impose, without violating constitutional principles, such extreme liability retroactively. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 537 (1998) (concluding that it was unconstitutional and fundamentally unfair for employers "to bear a burden that is substantial in amount, based on employers' conduct far in the past").

the Safety Act and FMVSS 205. Thus, the trial court's decision, concluding that FMVSS 205 preempted Petitioner's claim, should be affirmed.

IV. CONCLUSION

For the foregoing reasons, the trial court's entry of summary judgment, dismissing Petitioner's complaint should be affirmed. Because Petitioner's claim attempts to impose liability on a manufacturer for using a design authorized by federal law, her claim is preempted.

Dated: December 18, 2008

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOSEPHINE MORGAN

Plaintiff,

v.

FORD MOTOR COMPANY,
a Delaware corporation;
BRIDGESTONE/FIRESTONE, INC.,
an Ohio corporation; and
FRANCIS ROBERT MORGAN,

Defendants

and

MICHELLE ARCHULETA, as Personal Representative of
THE ESTATE OF FRANCIS ROBERT MORGAN,

Petitioner, Cross-Claim Plaintiff Below,

v.

FORD MOTOR COMPANY,
a Delaware corporation,

Respondent, Cross-Claim Defendant Below.

CERTIFICATE OF SERVICE

I, Stephanie D. Taylor, do hereby certify that I have served the foregoing Brief of the Product Liability Advisory Council, Inc., as Amicus Curiae in Support of Defendant-Appellee and Affirmance, by United States Mail, first class and postage prepaid, this 18th day of December, 2008:

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